(3)

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

No. 90-1602

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TENNESSEE GAS PIPELINE CO.,
Petitioner,
v.
ANDERMAN/SMITH OPERATING CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

Of Counsel:
VINCENT F. EWELL, JR.
JOHN E. LEA
TENNESSEE GAS PIPELINE COMPANY
1010 Milam Street
P.O. Box 2511
Houston, Texas 77252
(713) 757-1246

ERNEST G. TAYLOR, JR.
KATHRYN H. HESTER
W. WHITAKER RAYNER
WATKINS LUDLAM & STENNIS
633 North State Street
P.O. Box 427
Jackson, Mississippi 39205
(601) 949-4900

DANIEL JOSEPH, P.C.*
COLLEEN M. COYLE
MARGARET J. BABB
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

8

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	5

TABLE OF AUTHORITIES

CASES: Page

Amoco Oil Chemical Co. v. Oil, Chemical & Atomic Workers Union, 548 F.2d 1288 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977) 3
Dandridge v. Williams, 397 U.S. 471 (1970) 4
Ethyl Corp. v. United Steelworkers of America, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986) 3
Farkar Co. v. R. A. Hanson Disc, Ltd., 604 F.2d 1 (2d Cir. 1979) 4, 5
Kastigar v. United States, 406 U.S. 441 (1972) 4
Randall v. Lodge No. 176, IAM, 648 F.2d 462 (7th Cir. 1981) 2, 3
Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191 (7th Cir. 1987) 2, 3
United Paperworkers' International Union v. Misco, Inc., 484 U.S. 29 (1987) 3, 4
Young Radiator Co. v. International Union, United Auto Workers Local Union No. 37, 734 F.2d 321 (7th Cir. 1984) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1602

TENNESSEE GAS PIPELINE CO.,
Petitioner,

v.

ANDERMAN/SMITH OPERATING CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY TO BRIEF IN OPPOSITION

Most of the Brief in Opposition is question-begging, conclusory argument, or platitude. Very little real argument is set forth by Anderman's counsel, and not much response is necessary.

1. Anderman argues, as did the Fifth Circuit, that the arbitrators did not rewrite the contract terms, but only rejected "Tennessee's harsh construction" thereof. Opp. at 13. But as detailed in the Petition (at 10-11 and n.10), the arbitrators explicitly said both that they were rejecting the contract language itself and that they were replacing that contract language with provisions that they had crafted themselves.[1] Only by ignoring the state-

---

[1] The absurdity of Anderman's assertion can be shown by its statement that the arbitrators "found that Tennessee's harsh construction . . . was . . . unenforceable." Opp. at 13. Parties' arguments, even if wrong, are not described by the term "unenforce-

ments actually made by the arbitrators can Anderman, or the Fifth Circuit, assert that the arbitrators were interpreting the contract themselves or merely rejecting an interpretation offered by Tennessee.

2. The Petition showed that in holding that a reviewing court should ignore an arbitrator's written opinion and reasoning in determining whether the award exceeded the arbitrator's authority, the Fifth Circuit went into conflict with two decisions of the Seventh Circuit. Pet. 13-15. Anderman's Opposition makes no mention of the substance of this conflict and accordingly simply fails to deal with this issue.

Although Anderman argues (Opp. at 18-21) that the Fifth Circuit's decision is not in conflict with any decision of the Seventh Circuit, Anderman fails to acknowledge the Seventh Circuit's holding that, in determining whether an arbitrator has exceeded the proper scope of authority, the reviewing court *must consider* the language used by the arbitrator in explaining the decision. *Randall v. Lodge No. 176, IAM*, 648 F.2d 462, 468 (7th Cir. 1981); *Young Radiator Co. v. International Union, United Auto Workers Local Union No. 37*, 734 F.2d 321, 324 (7th Cir. 1984). Pet. at 13-14.

Similarly, Anderman simply fails (or refuses) to mention the Fifth Circuit's opposite and conflicting holding (Pet. App. at 8a, n.3) that a court *must ignore* the "language" and "reasoning" of the arbitrators.[2] By this

---

able," which describes only something, like a contract provision, that would otherwise have legal effect.

[2] In attempting to argue that the Seventh Circuit has "limited" the holdings of *Randall* and *Young Radiator*, Anderman succeeds in showing the opposite. In Anderman's own words, the Seventh Circuit held, in *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987), that the arbitrator's decision should be vacated when ". . . the reasons given by the arbitrator strongly imply that the arbitrator may have exceeded his or her authority." Opp. at 21, n.4. This is, of course, precisely the doctrine with which

silence, Anderman effectively concedes that the conflict exists.

3. Anderman claims that, contrary to the showing in the Petition, the Fifth Circuit "did not engage in its own interpretation of the contract in order to find some basis to uphold the award." Opp. at 22. But Anderman does not even attempt to support this bald assertion. As we discussed in the Petition, the Fifth Circuit quoted and construed a contract provision that the arbitrators never mentioned even indirectly, and then based its holding on the finding that the arbitrators' result was "rationally inferable" from the court's construction of that provision. Pet. 8, n.5 and accompanying text; Pet. App. 3a, 7a. Thus, having held that it could ignore the opinion and reasoning of the arbitrators themselves, the Fifth Circuit relied on its own analysis of the contract in upholding the arbitrators' result—a decision that conflicts with holdings of this Court and other courts of appeals. Pet. at 15-16.

---

the Fifth Circuit's present holding (that the court "does not review . . . the reasoning of . . . the arbitrators," Pet. App. 8a, n.3) conflicts.

Another Seventh Circuit case cited by Anderman, *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986), is also fully consistent. Anderman's characterization of the *Ethyl* holding is seriously misleading. Opp. at 9-10. Although the *Ethyl* opinion did say that reasonable doubt must be resolved in favor of the arbitrator's authority, it went on to say, *in the same sentence*, that "if the arbitrator here had said or implied [in his written opinion]" that the result had been reached using the arbitrator's idea of "fairness," rather than by consulting the contract text, then the reviewing court would have been correct in setting aside the award. 768 F.2d at 185. Anderman's Opposition fails to mention this latter portion of the sentence. Under the rule so announced in *Ethyl*, a reviewing court would have been compelled to set aside the arbitrators' award in the present case.

Amoco Oil Co. v. Oil, Chemical & Atomic Workers Union, 548 F.2d 1288 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977), also relied on by Anderman (Opp. at 19), was decided before *Randall, Young Radiator, Saturday Evening Post*, and *Ethyl*, and before this Court's *Misco* decision.

4. Anderman also asserts, erroneously, that the portion of this Court's holding in *United Paperworkers' International Union v. Misco, Inc.*, 484 U.S. 29 (1987), relied on in the Petition (at 14-15) is dictum. In that portion of *Misco* the Court held that where an arbitrator's opinion is "cryptic" on whether the arbitrator was exceeding his or her authority, a reviewing court may not rule on the issue itself but must vacate the arbitrator's decision and obtain a definitive opinion. *See* 484 U.S. at 41-42; Pet. at 15.

As parenthetically noted in the Petition (at 15) this was holding, not dictum. This portion of the Court's opinion rejected a ground for affirmance urged by the respondent Misco (i.e., that the remedy of reinstatement imposed by the arbitrator was not in accord with his authority) that was alternative to that rested on by the lower court in that case.[3] Because Misco, as respondent, was entitled to urge such an alternative argument in support of the lower court's judgment (i.e., *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)), this Court's rejection of that argument was necessary to its judgment of reversal, and was, accordingly, a holding. *Compare Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (opinion language that is not necessary to the decision is not binding authority).

In sum, the Opposition has failed to show any reason why the grounds adduced in the Petition do not warrant review.[4]

---

[3] See Point II of the Brief for Respondent in *Misco* (No. 86-651), especially at 32-33, the pages placing reliance on the very phrase in the arbitrator's opinion that this Court held was "cryptic" and not susceptible of the reading that the respondent Misco urged. *See* 484 U.S. at 41.

[4] Anderman's citation of *Farkar Co. v. R. A. Hanson Disc, Ltd.*, 604 F.2d 1, 2 (2d Cir. 1979) (Opp. at 13, n.3) does not support Anderman's argument that this case is not worthy of review. For one thing, as Anderman recognizes, the *Farkar* holding conflicts

CONCLUSION

For the reasons in the Petition and in this Reply, the writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
VINCENT F. EWELL, JR.
JOHN E. LEA
TENNESSEE GAS PIPELINE COMPANY
1010 Milam Street
P.O. Box 2511
Houston, Texas 77252
(713) 757-1246

ERNEST G. TAYLOR, JR.
KATHRYN H. HESTER
W. WHITAKER RAYNER
WATKINS LUDLAM & STENNIS
633 North State Street
P.O. Box 427
Jackson, Mississippi 39205
(601) 949-4900

DANIEL JOSEPH, P.C.*
COLLEEN M. COYLE
MARGARET J. BABB
AKIN, GUMP, STRAUSS, HAUER & FELD
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 887-4000
* Counsel of Record

---

with the cases cited by Tennessee at pages 10-11, footnote 3, of the Petition. Moreover, by holding that arbitrators must in at least some cases supply separate written explanations of the grounds for their decisions, the *Farkar* decision conflicts with the Fifth Circuit's decision in the present case. Finally, the *Farkar* decision appears to have been heavily influenced by state law; the opinion states that it "follow[s]" a decision of the New York Court of Appeals. *See* 604 F.2d at 2.